



Litigation Update

Litigation Section News

January 2006

Time requirements for anti-SLAPP motion may be waived.

The anti-SLAPP statute (*California Code of Civil Procedure*, § 425.16 (f)) provides that a special motion to strike "shall be noticed for hearing not more than 30 days after service unless the docket conditions of the court require a later hearing date." Where plaintiff agreed to a hearing date beyond the 30 days, it waived this requirement. *Greka Integrated, Inc. v. Lowrey* (Cal. App. Second Dist., Div. 6; November 15, 2005) 133 Cal.App.4th 1572, [35 Cal.Rptr.3d 684, 2005 DJDAR 13341].

Note: The opinion in *Greka* seems to assume that the motion must be *heard* within 30 days after service. But that is not what the statute says. It must be *noticed for hearing* within 30 days. But § 425.16 was amended to require that the clerk must schedule all anti-SLAPP motions within 30 days after service of the motion unless docket conditions require a later hearing.

Spousal support may not be terminated without spouse being given an opportunity to become self-supporting.

Although public policy has changed from one which "entitled some women to lifelong alimony as a condition of the marital contract of support to one that entitles either spouse to post-dissolution support for only so long as is necessary to become self-supporting" (*In re Marriage of Pendleton & Fireman* (2000) 24 Cal.4th 39, 53, [5 P.3d 839, 99 Cal.Rptr.2d 278]), a spouse must be given "fair notice of the expectation of self-sufficiency and a reasonable opportunity to achieve such goal." *In re Marriage of Schmir* (Cal. App. Second Dist., Div. 7; November 16, 2005) 134 Cal.App.4th 43, [35 Cal.Rptr.3d 716, 2005 DJDAR 13376]. The *Schmir* case held that it was an abuse of discretion to terminate spousal support abruptly, after 15 years, without having given the supported spouse notice that she was required to become self-supporting.

An order denying leave to amend a complaint is not appealable. The Court of Appeal dismissed an appeal from an order denying leave to amend a complaint to convert a cause of action to a class action. Such an order may only be appealed after a final

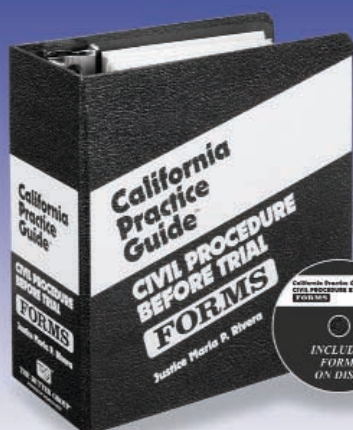
judgment is rendered. *Figueroa v. Northridge Hospital Medical Center* (Cal. App. Second Dist., Div. 2; October 20, 2005; ord. pub. November 16, 2005) 134 Cal.App.4th 10, [35 Cal.Rptr.3d, 677, 2005 DJDAR 13371].

Note: Such an order might be reviewable on a petition for a writ of mandate. The inability to assert the class action might be of sufficient importance as to justify the issuance of an extraordinary writ.

It's now OK to import kangaroos into California. *Pen. Code*, § 653(o) bans the importation of kangaroo products into California. An earlier federal law imposing similar restrictions was repealed after the Australian government agreed to adopt conservation measures protecting kangaroos. The California statute impinges on congress's purpose in negotiating the conservation measures with the government of Australia and is therefore preempted by federal law. *Viva! International Voice for Animals v. Adidas Promotional Retail Operations* (Cal. App. First Dist., Div. 1; November 21, 2005) 134 Cal.App.4th 133, [36 Cal.Rptr.3d 19, 2005 DJDAR 13495]. Any kangaroo steak lovers among our readers?

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Beware of frivolous appeals; they may be expensive. In *Evans v. CenterStone Development Co.* (Cal. App. Fourth Dist., Div. 3; November 21, 2005) 134 Cal.App.4th 151, [35 Cal.Rptr.3d 745, 2005 DJDAR 13504], appellant violated numerous rules pertaining to appeals and made many arguments seeking to have an arbitration award set aside that the court found to be frivolous. The agreement between the parties provided that the prevailing party recover its attorney fees. The Court of Appeal ordered the trial court to use the amount of fees incurred by the respondent on appeal as a lodestar and to award sanctions to petitioner in an equal amount. The sanction order ran against both appellant and his lawyers jointly and was order to be reported to the State Bar.

Katrina survivors need your help

Your legal expertise or other personal services are needed to assist in the recovery and rebuilding of the Gulf Coast.

Anyone able to contribute their legal skills or other personal services to the Red Cross can contact Mary C. Dollarhide of Paul Hastings, San Diego at marydollarhide@paulhastings.com. Please note "American Red Cross/Katrina Legal Support" in the subject line and provide the following information:

1. areas of legal expertise where you might assist the Red Cross (e.g., tax, real estate, licensing, criminal, etc.)
2. names of lawyer volunteers (organized under areas of legal expertise) and jurisdictions in which you are licensed and could provide advice
3. other information you believe may be of use in assisting Red Cross national headquarters.

This information will be provided to the Red Cross which will in turn contact you.

Setting aside summary judgment redux. In our November *Litigation Update* we reported that a summary judgment could not be set aside under *California Code of Civil Procedure* § 473(b), even though the losing party's lawyer had failed to oppose the motion. We failed to cite the case so holding. It is *Prieto v. Loyola Marymount University* (Cal. App. Second Dist., Div. 8; August 30, 2005) 132 Cal.App.4th 290, [33 Cal.Rptr.3d 639, 2005 DJDAR 10682].

New SLAPP-back statute limits special motions to strike.

A SLAPP-back motion is defined in newly enacted *California Code of Civil Procedure* § 425.18 (b)(1) as an anti-SLAPP motion filed against "any cause of action for malicious prosecution or abuse of process arising from the filing or maintenance of a prior cause of action that has been dismissed pursuant to a special motion to strike under section 425.16." Such motions are subject to specified limitations such as different time deadlines, the denial is not appealable, and the filing of an appeal does not stay discovery. There also are mandatory sanctions against a defendant who files such a motion frivolously or for the purpose of delay.

Sunset clause deleted from CCP § 128.7. *California Code of Civil Procedure* § 128.7 specifies criteria and procedures for the imposition of sanctions. The statute contained a clause providing it would sunset on January 1, 2006. The legislature has amended the statute by removing this clause.

Bite your tongue before accusing the court of dishonesty. Lawyer Debra Koven filed a petition for rehearing after the Court of Appeal ruled against her client. In the petition she accused the court of "deliberate judicial dishonesty." Apparently this was true to form because she had similarly impugned the integrity of the trial judge, opposing counsel, and counsel's expert witness. The Court of Appeal was not amused and held her in criminal contempt. The court imposed a fine and reported her to the State Bar for appropriate disciplinary action. But the court noted that Ms Koven only avoided jail time because she had apologized for her conduct. *In*

Re Debra L. Koven (Cal. App. Second Dist., Div. 6; November 22, 2005, as modified) 134 Cal.App.4th 262, [35 Cal.Rptr.3d 917, 2005 DJDAR 13550].

Coastal Commission's convoluted procedures explained.

Although the case may not be cited because it was filed as an unpublished opinion, anyone having business before the California Coastal Commission would do well to read *Butterfield v. California Coastal Com'n* (Cal. App. Fourth Dist., Div. 3; September 22, 2005) (Case No. G034143). In supporting the position of the Commission, the case attempts to reconcile the procedures actually employed by the Commission with its own regulations and the applicable statutes. The dissenting opinion argues that these cannot be reconciled. Michael Berger, Esq. titles his article in the Los Angeles Daily Journal of December 2, 2005, "Yes" means 'no' in Coastal Commission Realm."

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